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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1100~~ 703

JOSE AURRECOECHEA, PLAINTIFF IN ERROR,

vs.

AMOS S. BANGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 11, 1883.

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1 UNITED STATES OF AMERICA, *ss.*

To Amos S. Bangs, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein José Aurrecoechea is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States, this 12th day of July, A. D. 1883, and of the independence of the United States the 108th.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Ct.

2 I hereby admit service of the within citation on this the 13th day of July, 1883.

JAS. C. MARTIN,
Attorney for Defendant in Error, Amos S. Bangs.

(Endorsed:) United States Supreme Court. José Aurrecoechea, pl'ff in error, vs. Amos S. Bangs, def't in error. Citation.

3 In the Supreme Court of the State of California.

JOSÉ AURRECOECHEA, PL'FF,
vs.
AMOS. S. BANGS, DEF'T. } No. 7449.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } *ss.*

Henry F. Crane, being duly sworn, doth depose and say that he was and is the attorney of record for the above-named plaintiff in this cause in the Supreme Court of the State of California.

That he is, and has been for several years last past, well acquainted with the land in dispute and other lands in the vicinity of the land described in the complaint, and of the value thereof.

That the land described in the complaint in this action is of the value of over five thousand dollars, exclusive of costs.

HENRY F. CRANE.

Subscribed and sworn to before me on this 12th day of July, 1883.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

4 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Justices of the Supreme Court of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between José Aurrecoechea, plaintiff in error, and Amos L. Bangs, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said U. S. Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said U. S. Supreme Conrt may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of July in the year of our Lord one thousand eight hundred and eighty-three, and of the independence of the United States the one hundred and 108th.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Cir't Court Dis't Cal.

It appearing that a federal question is involved in the cause mentioned in this writ of error and by the affidavit of the attor-
5 ney of record for the plaintiff in the supreme court of the state, which affidavit is hereto annexed, that the land in controversy exceeds in value the sum of five thousand dollars exclusive of costs, the writ is allowed, but without a stay of proceedings.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

(Endorsed:) United States Supreme Court. José Aurrecoechea, pl'ff in error, vs. Amos S. Bangs, def't in error. Writ of error.

6 In the Supreme Court of the State of California.

THIRD DISTRICT COURT,
COUNTY OF ALAMEDA,
STATE CALIFORNIA.

JOSE AURRECOECHEA, PLAINTIFF AND Appellant,
vs.
AMOS S. BANGS, JOHN DOE, and Richard Roe, Defendants and Respondents.
} Complaint.

The plaintiff, Jose Aurrecoechea, for cause of action against the above-named defendants, avers and shows to said court the following facts, to wit:

That the plaintiff is ignorant of the names of certain defendants herein, and has designated such defendants by the names of John Doe and Richard Roe.

I.

That heretofore, to wit, in the year 1863, the State of California, by her proper officer, to wit, the state locating agent, and in pursuance and under and by virtue of the laws of said state, and in part satisfaction of the grant by the United States to said state of the 16th and 36th sections of land in each township in said state, or other lands in lieu thereof, under an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853, selected and located the following-described land, viz:

The northeast quarter of section thirteen, township three south, range two east, Mount Diablo meridian, in the county of Alameda, State of California, containing one hundred and sixty acres of land, more or less.

That said land was so selected and located by the State of California in lieu of and as indemnity for certain 16th and 36th sections of land in said state, or portions thereof, which had become lost to said state under the terms and conditions of said act of Congress aforesaid.

7 II.

That thereafter, and on the 17th day of February, 1864, the state of California, under and in pursuance of the laws of said state, in that behalf made and provided, sold said tract of land so selected and located as aforesaid, and the plaintiff and his grantors became and were the purchasers of said land in good faith, from the state of California, and then and there paid to said state the purchase price therefor, pursuant to the law of the state, and then and there the state of California, by its proper officer, to wit, the register of the state land office, issued and delivered to the grantors of the plaintiff, pursuant to the law of the state, a certificate of purchase of said land.

That in or about the year 1865, the grantor of the plaintiff, under and by virtue of said purchase, and said certificate of

purchase, entered into and upon said tract of land, and thereafter held and enjoyed the actual possession thereof, until he was ousted therefrom by the defendants, as hereinafter more fully shown.

III.

That prior to the year 1866, the State of California had, in the manner aforesaid, selected and located a large amount of land in said state in part satisfaction of grants by the United States to said state, and had in pursuance of the laws of said state, sold said lands to purchasers in good faith under said laws; that many of such selections and locations were believed to be irregular and invalid under the laws of the United States by reason of the defective legislation and action on the part of the state in the selection and disposal of said lands; and the selection and location of the land hereinbefore described and sold to the grantor of the plaintiff was one of such irregular selections and locations.

That for the purpose of furnishing relief to all such *bona fide* purchasers of lands from the state, and for the purpose of furnishing them with the means and opportunity of perfecting their said purchases and acquiring the legal title to the lands so as aforesaid purchased by them from the State of California, and at the request of said state, through its legislature, the Congress of the United States did, on the 23d day of July, 1866, pass an act entitled "An act to quiet land titles in California."

That the township embracing the tract of land hereinbefore designated and described, was surveyed in the field by the Surveyor-General of the United States for the State of California, and by him sectionized and sub-divided in the year 1862; that
8 thereafter, and in the same year, he constructed such survey and delineated the same into and upon a township plat, and approved such survey and plat, and caused a duplicate of such township plat, so made and approved as aforesaid by him, to be filed in the General Land Office of the United States at Washington, and in the office of the said surveyor-general at San Francisco; and, as the plaintiff is informed and verily believes, the said surveyor-general, at the same time, to wit, in the year 1862, also caused a duplicate of such township plat and survey to be filed in the local land office in the district embracing said land, to wit, at San Francisco; that such township plat was afterward, and after said state selection and location had been made by some person unknown to the plaintiff, withdrawn and removed from said local land office, but was afterwards, and on or about the first day of July, 1871, returned and filed in said local land office, where the same has since remained and is now on file.

IV.

That long prior to said last named date the plaintiff, and those under whom he claims said land, had presented said state selection

and location, and the claim and title to said land thereunder, to the register and officers of said local land office of the United States; and said officers had full and particular notice thereof, and said selection and location was by said register noted and entered in writing upon the tract books of said local land office, and the same was also entered upon and noted in writing upon the tract books of the General Land Office of the United States at Washington; that such notice and presentation was made, and noted, and entered in said tract books, as aforesaid, some time in the year 1866.

That said register of the local land office of the United States had full knowledge of all the facts herein stated in relation to said location and selection and sale by the state, and of the purchase of said land by the grantor of the plaintiff, from and after the date of such presentation and notice and entry as aforesaid, but neglected to take any action thereon on account of the delay in the final settlement of the survey of that certain Mexican grant called "Las Pocitas," as hereinafter more particularly mentioned.

V.

That on or about the 24th day of September, 1870, the defendant, Amos S. Bangs, with full knowledge of the claim and title of the plaintiff to said land, as herein stated, and while the plaintiff, or those under whom he claims, was in possession of said land, as aforesaid, did enter into and upon said land, and did oust the plaintiff, and those under whom he claims, therefrom—claiming the right to pre-empt said land under the general pre-emption laws of the United States.

That on or about the 26th day of June, 1871, said defendant Bangs filed in the local land office of the United States a declaratory statement of his intention to pre-empt said land.

VI.

That some time prior to the year 1860 one Robert Livermore and another had obtained the final confirmation in their names, under the laws of the United States, of that certain Mexican grant called "Las Pocitas;" that in the final decree of confirmation the land designated and described as belonging to said grant is stated as follows: "The land of which confirmation is hereby made is known as Las Pocitas, and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose; and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein then that less quantity is hereby confirmed."

That, as a matter of fact, the area of land embraced by the

above-named boundaries is from ten to twelve square leagues, and embraces the greater portion of the land in the place known as the Livermore Valley, in said Alameda County, and said exterior boundaries embrace the land in controversy in this action.

That in the year 1869 the surveyor-general of the United States for the State of California made an official survey of said grant, which purported to segregate all the land rightfully belonging to said grant "Las Pocitas," which survey embraced about two square leagues of land; that such survey became the final survey of said grant by the approval of the same by the Secretary of the Interior of the United States on the 6th day of June, 1871, and a patent was issued by the United States embracing the land contained in said survey, which patent was received by the claimants under said grant in full satisfaction thereof, and that such survey and patent does not embrace any portion of the land in controversy in this action.

VII.

That after the plat of survey of said township embracing the land in controversy had been returned to said local land office as asorsaid on the first day of July, 1871, and within three months thereafter, the plaintiff and those under whom he claims being the purchasers of said land and claiming the same under said state's selection and location, again presented said claim and fully proved up such purchase and claim, so far as the facts were concerned, to the satisfaction of the Commissioner of the General Land Office of the United States.

That at the same time said defendant Bangs contested the claim of the plaintiff aforesaid before the officers of the Land Departments of the United States, claiming the right to pre-empt said land as before stated; that, upon such contest and investigation, said commissioner found as matter of fact that in the year 1863 the State of California selected and located said land under the laws of said state, and did thereafter sell and dispose of the same to the grantor of the plaintiff, as is hereinbefore more fully stated; and that, on the 17th day of February, 1864, the grantor of the plaintiff became the purchaser in good faith of said land from the state under her laws, paid the purchase price, and received a certificate of purchase therefor, as hereinbefore stated; and said commissioner found generally all the facts the same as they are stated in this complaint, and thereupon said plaintiff, and those under whom he claims, submitted said claim to said commissioner, and asked that said land be certified over to the State of California, pursuant to said act of Congress entitled "An act to quiet land titles in California."

That the only objection made to said claim on said contest and investigation, and the only objection which has ever existed thereto, was the fact that said land, so selected and located as aforesaid,

was embraced by said exterior boundaries of the Mexican grant "Las Pocitas," and that it was part and parcel of said ten or twelve square leagues aforesaid; that said contest and investigation was had long after said tract of land in question had been forever excluded from any claim under said Mexican grant, and at a time when the same was subject to disposition by the commissioner aforesaid as other public lands of the United States.

That upon such issue and question of law above, the Commissioner of the General Land Office of the United States and the Secretary of the Interior of the United States both held and decided, upon their construction of the said act of Congress of July 23, 1866, that said land and claim was excluded from the operation and effect, and from the remedial and confirmatory provisions, and all the provisions of said act of Congress, and solely because
11 of the fact, and for no other reason than the following, to wit, because said land had been embraced by the exterior boundaries of said Mexican grant, and held or claimed under said grant until the 6th day of June, 1871; and thereupon, and for that reason and no other, said Commissioner of the General Land Office of the United States refused to approve said claim, and refused to certify said land over to the State of California, but rejected said claim, and then and there awarded said land to the defendant Bangs, in virtue of his pre-emption claim aforesaid, and made an order permitting said Bangs to enter said land under said pre-emption claim.

That afterwards, and in pursuance of said decision, said Bangs was permitted to, and did enter, said land, and on or about the 6th day of September, 1876, in pursuance of said entry and decision, said commissioner caused a patent of the United States to be issued and delivered to said defendant Amos Bangs for said land—which patent transferred the title of said land to said Bangs.

VIII.

The plaintiff avers that the decision of the commissioner and Secretary of the Interior aforesaid was, and is, contrary to law, and that in making such decision said officers were mistaken in the legal construction of said act of Congress; that if said officers had decided said matter according to law, said selection and location and claim of the plaintiff would have been approved, and the land would have been certified over to the State of California pursuant to said act of Congress of July 23, 1866, and the plaintiff would have been enabled to, and would have acquired the legal title to said lands under the laws of the United States and said State of California—that by reason of the acts of the defendant Bangs as aforesaid, and the mistake of said officers as aforesaid, the plaintiff has been forever prevented and disabled from perfecting his title to said land under the laws of the United States and the laws of the State of California, to his great wrong and injury.

Service of the within demurrer, by copy, is hereby admitted, 26th

The said plaintiff is now the owner and holder of said certificate of purchase of said land from the State of California, and the equitable owner of said land hereinbefore described as hereinbefore stated.

IX.

That the other defendants named in the title of this complaint have or claim to have some interest in, or claim to, said land, holding or claiming to hold the same under or through said defendant Amos S. Bangs, as the plaintiff is informed and verily be-

12 lieves; but what the nature or character of such interest or claim is the plaintiff is not fully informed, and is therefore unable to state more fully than as aforesaid.

Wherefore the plaintiff prays that all of the defendants above named may be required to appear in this action and answer this complaint, and set forth fully the nature of their interest in or claim to said land.

That it may be adjudged and decreed by this court that the plaintiff is the equitable and rightful owner of said land, and that the legal title to the same now held by the defendant Amos S. Bangs, or either of the defendants herein, is so held in trust for the plaintiff.

That it be further adjudged and decreed by the court that the defendants convey said legal title to said land to the plaintiff herein, and that the legal title to the said land may be conveyed to the plaintiff by said defendants, or by a commissioner duly appointed by this court, and that the plaintiff may have such further or other relief as may be meet and proper and agreeable to equity and good conscience, and may have and recover the costs of this action.

H. F. CRANE AND
PRINGLE & HAYNE,
Plaintiff's Attorneys.
SIDNEY L. JOHNSON.
Of Counsel.

[Duly verified.]

Demurrer.

[Title of court and cause.]

And now comes Amos S. Bangs, one of the above named defendants, and demurs to the complaint of the plaintiff above named, herein filed, and for grounds specifies:

That the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore this defendant prays judgment that he should not further answer, and for costs of suit.

MONTGOMERY & MARTIN,
Att'ys for Def't Amos S. Bangs.

(Endorsed:) Filed April 26th, 1878.

CHAS. G. REED, *Clerk.*
By GEO. W. REED, *Deputy.*

Service of the within demurrer, by copy, is hereby admitted, 26th day of April, A. D. 1878.

H. F. CRANE,
Att'y for Plaintiff.

Order Sustaining Demurrer to Complaint.

[Title of court and cause.]

APRIL TERM, A. D. 1879,
MONDAY, *April 28th*, 1879.

Present Hon. S. B. McKee, Judge.

13 This cause having been heretofore submitted to the court upon the demurrer of the defendant Amos S. Bangs to the complaint in said cause, and the court having now fully considered the same, it is ordered that said demurrer be, and the same is hereby sustained, and with leave to plaintiff to amend his complaint within ten days.

Notice of Sustaining of Demurrer.

[Title of court and cause.]

To Messrs. H. F. Crane and Pringle & Hayne, attorneys for plaintiff:

Gents.—Please take notice that on Monday, April 28th, A. D. 1879, the third district court in and for Alameda County entered an order sustaining the demurrer of defendant Amos S. Bangs to the complaint of plaintiff in the above-entitled action, with leave to plaintiff to amend said complaint within ten (10) days.

Yours respectfully,
CURTIS H. LINDLEY AND
MONTGOMERY & MARTIN,
Att'ys for def't Amos S. Bangs.

Dated April 30th, 1879.

(Endorsed:) Filed May 1st, 1879.
CHAS. G. REED, *Clerk.*
By GEO. W. REED, *Deputy Clerk.*

Due service of the within admitted this 1st day of May, 1879.
H. F. CRANE,
Attorney for Plaintiff.

Judgment.

[Title of court and cause.]

IN OPEN COURT, *August 15th*, 1879.

In this action the defendant, Amos S. Bangs, having been duly served with process, and having within due time filed a demurrer to the complaint, and said demurrer having been submitted to the

court for consideration and decision, and on the 28th day of April, 1879, said demurrer having been by the court sustained, with leave to plaintiff to amend his complaint within ten days; and afterwards, to wit, on the 29th day of April, 1879, the time to amend the complaint having been increased to twenty days, and notice of the sustaining of said demurrer having been duly served upon plaintiff's attorney on the 1st day of May, 1879, and the plaintiff having failed and neglected to amend his complaint within the time so allowed by the court, Curtis H. Lindley, Esq., attorney for defendants, appeared in open court on the 15th day of August,
14 1879, and, upon statement of the foregoing facts, moved the court that the default of the said plaintiff for such failure to amend his complaint be entered therein, and that final judgment be entered herein in favor of the said defendant, Amos S. Bangs, and against the plaintiff for his costs, and it was so ordered by the court.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is by the court here ordered, adjudged, and decreed that the said plaintiff, Jose Aurrecoechea, do take nothing by this action, and that the said defendant, Amos S. Bangs, do have and recover of and from the said plaintiff, Jose Aurrecoechea, his costs of suit in this behalf expended, amounting to the sum of $

Judgment entered Oct. 9, 1879.

CHAS. G. REED, *Clerk.*
By GEO. W. REED,
Deputy Clerk.

G. Page 126.

Notice of Appeal.

[Title of court and cause.]

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of this state from the judgment rendered in the District Court of the Third Judicial District of the County of Alameda, State of California, therein entered, in the said district court, on the ninth day of October, 1879, in favor of defendants in said action and against said plaintiff and from the whole thereof.

Dated this 25th day of August, 1880.

Yours, &c.,

PRINGLE & HAYNE and
H. F. CRANE,
Attorneys for Plaintiff.
SIDNEY L. JOHNSON,
Of Counsel.

To the clerk of the said district court and Montgomery & Martin, attorneys for defendant, Amos S. Bangs.

(Endorsed:) Filed August 28th, 1880.

ANDREW RYDER, *Clerk.*
By A. W. GASKILL,
Deputy Clerk.

Service and receipt of a copy admitted this 28th day of August, 1880.

MONTGOMERY & MARTIN,
Att'ys for Deft't, Amos S. Bangs.

Stipulation.

[Title of court and cause.]

15 It is hereby stipulated that the foregoing transcript is correct, and that the pleadings, order, and notice therein are true copies of the originals of record in the Superior Court of Alameda County, and that the statement therein as to the entry of judgment is true, and that said transcript shall constitute the record on the plaintiff's appeal from the judgment, and that an undertaking on said appeal, in due form, was filed in due time.

MONTGOMERY & MARTIN,
Attorneys for Defendants.
H. F. CRANE and
PRINGLE & HAYNE,
Attorneys for Plaintiff.

(Endorsed:) Filed Oct. 8, 1880.

F. W. GRASS, *Clerk.*
By J. B. MARTIN, *Deputy.*

Opinion of Court.

In Bank. (Filed May 30, 1882.)

AURRECORCHEA *vs.* SINCLAIR. } No. 7,251.

By the complaint in this case, the plaintiff seeks to charge the defendant as trustee of the legal title to a tract of land in Alameda County, known and described as the north half of the southeast quarter of section seven, township three south, range three west, M. D. meridian. A demurrer to the complaint was sustained by the court below, the plaintiff declined to amend, and, final judgment having been entered against him, he appeals.

Originally, as it appears from the complaint, the land formed a part of several leagues of land embraced within the exterior boundaries of a Mexican grant named Las Pocitas; and it stood in that

position until June 6, 1871, when it was excluded from the grant by the confirmation of the final survey of the ranch.

On July 1, 1871, the surveyor-general of the United States for the State of California, having surveyed in the field the township within which the land was located, and sectionized and subdivided it, and constructed his survey into and upon a township plat, a duplicate of which he filed in the local land office in the district of San Francisco, within which the land was located; and the defendant, who was then and had been in possession of the land, residing upon and claiming it as a pre-emptioner, presented and filed in the local land office his declaratory statement of his intention to pre-empt the land under the pre-emption laws of the United States. Thereafter, and within three months after the township plat had been filed, the plaintiff, who also claimed the land as a purchaser from the State of California, presented and filed in the same office a claim to have the land certified over to the state for his benefit, pursuant to an act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866.

Upon these hostile and opposing claims a contest arose, before the officers of the land department of the United States, which was heard by the Commissioner of the General Land Office, and determined adversely to the plaintiff; and the decision, on appeal, was affirmed by the Secretary of the Interior. By the decision the claim of the plaintiff was rejected; and, instead of certifying the land over to the State of California for his benefit, as, under the act of July 23, 1866, the plaintiff claims the commissioner and Secretary of the Interior were bound to do, they, in alleged violation of the provisions of that act, awarded the land to the defendant under the pre-emption laws of the United States, and made an order permitting him to enter it under his pre-emption claim, and, upon his entry and payment of the purchase price of the land, caused to be issued and delivered to him a patent therefor on the 15th of August, 1876.

The plaintiff alleges that this decision was contrary to law, because he proved, in the investigation of the contest, to the satisfaction of the Commissioner of the General Land Office, and the commissioner found that, in the year 1863, the State of California, by its locating agent, selected and located the land in dispute in part satisfaction of the grant by the United States to said state of the 16th and 36th section of land, in each township in said state, under an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853; and also in lieu of, and as indemnity for, certain of said 16th and 36th sections of lands in the state, or portions thereof, which had become lost to the state, under the terms and conditions of the act of Congress; that the state, after it had so selected and located the land, sold and disposed of the same to the grantors of the plaintiff

on the 17th of February, 1864, to whom, on payment of the purchase price "pursuant to the law of the state," the register of the state land office issued and delivered a certificate of purchase, under and by virtue of which the purchasers entered into possession of the land and continued in possession until September 24, 1870, when the defendant intruded upon their possession, and from that date has continued in the undisturbed possession of the same. But the plaintiff, and those under whom he claims, "some time in 1866," presented to the register and officers of the local land office of the United States the state selection and location and their claim of title thereunder; and the same was by the register noted and entered in writing upon the tract-book of the local land office, and upon the track-books of the General Land Office of the United States at Washington, whereby the officers of the land department had notice of the equitable rights of the plaintiff.

Upon these proofs and findings the plaintiff claims that the land should have been certified over to the state for his benefit; and that he is now entitled to the patent, which, upon the erroneous decision of the commissioner and Secretary of the Interior, has come into the hands of the defendant.

There is no doubt that where a party has obtained from the United States a patent to a tract of public land, which, in equity and good conscience, and by the laws which Congress has passed on the subject, ought, upon a true construction of those laws, to go to another who establishes a prior right to it, that a court of equity will control the patent in favor of the prior equity and compel a conveyance of it to the owner of the equity (Johnson *vs.* Towsley, 13 Wall., 72; Silver *vs.* Ladd, 7 Id., 228; Garland *vs.* Wynn, 20 How., 6; Lindsey *vs.* Hawes, 2 Black., 554); but to entitle the claimant of a patent issued to another to equitable relief he must show such a right to the premises described in the patent as, in equity and good conscience, and according to the laws of Congress upon which he relies, entitles him to the patent. Coming into a court of equity, asking for the interference of equity, he must not only show an equitable right to relief, but he must offer to do equity. He must show a reason valid in conscience as well as an equitable title enforceable in a court of chancery.

Now it will be observed that the basis of the claim asserted by the plaintiff rests upon the act of Congress passed July 23, 1866. By that act Congress undertook to confirm to the state all selections of any portion of the public domain, made by her in part satisfaction of any Congressional grant, and which she had disposed of to purchasers in good faith under her laws. Certain lands were excepted from such confirmation, among which were lands covered by a Mexican or Spanish grant at the time of the selection. But if such lands were afterwards excluded from the grant, and became part of the public domain of the United States, they were made subject to the selection and to confirmation when the United

States surveys were extended over them. (Huff *vs.* Doyle, 3 Otto, 558.) To this last class of lands the land in dispute belonged. It was not surveyed by the United States until 1871, and the official plat of the survey was not filed in the proper land office until the 28th of June, 1871. On that day the land became and was part of the public domain of the United States, and, for the first time, it was open for settlement as other public lands of the United States, to the plaintiff claiming as a purchaser under the state laws under the act of Congress, or to the defendant, who was then in possession of it, claiming the right to pre-empt it under the pre-emption laws. (Rich *vs.* Maples, 33 Cal., 109; Mahoney *vs.* Van Winkle, Id., 448; Newhall *vs.* Sanger, 2 Otto, 762.) When it became public land the claims to it of both the plaintiff and defendant depended upon the respective Congressional enactments under which they were presented to the land office. Neither of the parties acquired any equitable right to the land by the mere assertion of his claim. It was necessary for each to establish his right by making the proof required by the law under which he asserted it, and by showing a compliance with its terms and conditions. Originating, as did the right of the defendant, in the possession which he had of the land at the date of the filing of the official plat, his settlement gave him the status of pre-emptioner under the pre-emption laws. At the same time the act of Congress of July 23, 1866, extended to a purchaser in good faith from the state, whose right originated in selection and location under the state laws, the same pre-emption rights. Both *bona fide* purchasers from the state and pre-emption claimants under the United States were placed by the act on the same footing as to the acquisition of title. The object of the act, as has been said by our predecessors in Mandel *vs.* Toland (38 Cal., 30) "was to legalize the possession of locators upon unsurveyed lands until they have opportunity to present their claims for determination by the officers of the United States, as provided by the act, and to enable them to maintain actions in the courts in relation to it." (Foscalina *vs.* Doyle, 47 Cal., 437.) As residence and cultivation precede entry by a pre-emptioner, under the pre-emption laws, so selection and location upon public lands are necessary to the claim of a *bona fide* purchaser from the state under the act; cultivable lands belonging to the state are grantable only to actual settlers. (Johnson *vs.* Squires, 55 Cal., 103.) The plaintiff admits that the state's selection was void, and that by it alone he acquired no right. He has, therefore, no equitable right to the land, unless the alleged selection and location have been recognized and ratified by the provisions of the act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the act.

That act undertook to confirm selections made by the state upon two classes of land: 1st, lands which had been surveyed by the authority of the United States, and 2d, lands which had not been

so surveyed. Section 2 provides, as a condition precedent to confirmation of selections upon surveyed lands, for a notice of such selection to be given by the "proper state authorities" to the register of the United States land office. The law made the selection when this notice was given; and upon being given, it became the duty of the register to investigate and determine the claim, and if found to be for land to which the state would be entitled by the grant under which the claim of selection is made, the proper officer of the United States land office was authorized to certify it over to the state, if the state had not already received the quantity of land that she was entitled to, under her grant, as provided by sections 1 and 2 of the act.

But if selections had been made upon unsurveyed lands, such selections, when surveyed, and marked off and designated in the field, gave, according to the provisions of section 3 of the act, to a purchaser in good faith under the laws of the state, the pre-emption rights of a settler on the unsurveyed lands; and upon the filing of the township plat in the proper local land office, the state claimant was allowed the same time as a pre-emptor to present and prove up his purchase and claim under the act.

Now the alleged selection must have been made on surveyed or unsurveyed land. If made on unsurveyed land the complaint of the plaintiff fails to show that the "proper authorities of the state" had notified the register of the proper land office of the
16 selection, and neither that officer nor any other officer of the land office, was bound by the act to certify the land over to the state. The complaint is also uncertain as to whether the claim of the plaintiff is asserted upon a selection made on surveyed or unsurveyed land; for while the complaint contains averments which show that, at the date of the selection, the land had been surveyed in the field by the proper officer, and that a record of the survey and plat thereof was made and filed, but was afterwards withdrawn, it also shows that the land did not become part of the public domain until it was excluded from the Mexican grant, within the exterior limits of which it was at the time of the alleged survey, and it was not subject to selection under the act of Congress until the filing of the official plat.

Besides, whether the land was surveyed or unsurveyed, it was necessary for the complaint to show by proper averments that the plaintiff, in the assertion of his claim to the land, proved that he had purchased it in good faith from the state; that it had been selected and located under the laws of the state as part of the surveyed or unsurveyed lands of the United States, which were subject to be so selected; and that he had complied with the terms and conditions of the act of Congress which ratified the selection (The Secretary vs. McGarrahan, 9 Wall., 298); these constituted the elements of his asserted equitable right. But upon all of them the complaint is uncertain and insufficient. It is not alleged, nor

does the plaintiff claim, that he purchased the land directly from the state, or that he ever located on it, or occupied or improved it, or paid or contracted to pay the state for it. On the contrary, it is alleged that the land was purchased from the state by his grantor or grantors, to whom, after making a payment pursuant to the laws of the state, which required a payment of twenty per cent. of the purchase, a certificate of purchase was issued, under which they occupied the land until 1870, when they were dispossessed by the defendant, who has ever since continued in the unquestioned and undisturbed possession of the land. And, except so far as it may appear from the averments of the legal conclusions that they were *bona-fide* purchasers under the law of the state, and that a certificate of purchase was issued to him, it does not appear from any allegations in the complaint that they had complied with the laws of the state so as to constitute them *bona-fide* purchasers from the state. It might be that the authorities of the state had refused to notify the register of the land office of the selection of the land, as they were bound to do by the second section of the act of Congress, just because the alleged purchasers had not complied with the state laws; and *non constat* that the state would have conveyed to them the land if it had been selected. Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute. It is true that under the laws of the state the certificate of purchase was made evidence of the legal title; but having been issued for land which was not public land, and had not been surveyed by the United States, the certificate was void (Young vs. Shinn, 48 Cal., 26); being void, it was not in itself evidence of that location on the land and that purchase of it from the state and payment for it which would constitute them *bona-fide* purchasers.

To constitute them such, as against the patentee of the United States, to whose title they assert a better right, it would be necessary for them to allege in their pleading, that in the contest for the land before the land department they not only produced their certificate of purchase, but they also proved, and there was "found" the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the state, so as to entitle them to a patent from the state. (Laughlin vs. McGarvey, 50 Cal., 169; Cadierque vs. Duran, 49 Id., 356; The Secretary vs. McGarrahan, *supra.*) Unless those things were proved and "found" they would fail to show in themselves that better right in favor of which a court of equity would interpose to control the right of the patentee; and one who claims simply, and by no other right than as assignee of their void certificate of purchase, is in no better position.

Moreover, it does not appear by any allegation in the complaint *when* the assignment of the certificate of purchase was made—

whether before or after the contest of the land department—nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the state.

He filed the complaint in this case in April, 1878, and all that he alleges on that subject is "that he is *now* the owner and holder of the certificate of purchase." Inferentially, therefore, he did not become the owner and holder of it until after the decision of the land department. If he purchased after that, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent; and as a purchaser of the certificate from the alleged original purchasers from the state, with notice of those things, he is not a *bona fide* purchaser from the state within the meaning of the act of Congress.

But whether the purchase of the void certificate was made before or after the contest before the officers of the United States land department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to the equity nor good conscience to compel the defendant to convey to him the legal title.

Furthermore, there is no allegation in the complaint that the land for which it is alleged that the land in dispute was selected, has been lost to the state. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of selection has not accrued, because land within the exterior limits of a Mexican grant did not, under the act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the surveyor-general of the United States for the state had furnished the state with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and in consequence thereof were lost to the state. (Sec. 6, act July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished the right to select had not accrued, and the land in dispute was not subject to selection. (Sherman vs. Bruick, 3 Otto, 209.)

It follows that the plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entiles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to cotrol the patent which was issued to him.

Judgment affirmed.

McKEE, J.

We concur:
MYRICK, J.
SHARPSTEIN, J.
MORRISON, C. J.

I concur in the judgment:
McKINSTRY, J.

In Bank.—[Filed May 30, 1882.]

By the court.

AURRECORCHEA *vs.* BANGS. } No. 7,447.

Upon the authority of Aurrecorchea vs. Sinclair, 7,251, judgment affirmed.

17 In the Supreme Court of the State of California.
No. 7449. In Bank.

[*Judgment of Supreme Court.*]

JOSE AURRECOECHEA, APPELLANT, *vs.* AMOS S. BANGS ET AL., RESPONDENTS. } On appeal from the Supreme Court in and for the county of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court. Whereupon it is adjudged and decreed by the court that the judgment of the District Court of the 3d Judicial District in and for the County of Alameda in the above entitled cause, be and the same is hereby affirmed with costs.

I, John W. McCarthy, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 30th day of May, A. D. 1882, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 11th day of July, A. D. 1883.

J. W. McCARTHY, *Clerk.*

(Endorsed:) In the Supreme Court, State of California. Jose Aurrecoechea *vs.* Amos S. Bangs.

18 *Bond on Writ of Error.*

In the Supreme Court of the State of California.

JOSE AURRECOECHEA, PL'FF IN ERROR, *vs.* AMOS S. BANGS ET ALS., DEF'TS IN ERROR. }

Know all men by these presents that the undersigned, Jose Aurrecoechea, as principal, and M. Routet and Cayetano C. Diez, as sureties, are held and firmly bound unto Amos S. Bangs, of the county of Alameda, State of California, in the sum of one thousand dollars lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed by us on this, the twelfth day of July, 1883.

The condition of this obligation is such, that whereas the above bounden Jose Aurrecoecha is about to cause a writ of error to issue out of the Supreme Court of the United States in that certain cause entitled "Jose Aurrecoechea vs. Amos S. Bangs et als.," directed to the Supreme Court of the State of California, requiring the record and judgment in said cause to be brought before said Su-
19 preme Court of the United States for review by said court.

Now, therefore, if the said Jose Aurrecoechea, the plaintiff in error, shall prosecute his writ to effect, and if he fail to make his plea good shall answer all damages and costs, then this obligation shall be void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our and each of our hands and seals on the day and year first above written.

JOSE AURRECOECHEA. [L. S.]
M. ROUTET. [L. S.]
CAYETANO C. DIEZ. [L. S.]

Signed and sealed in presence of—
GEO. T. KNOX.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } *ss.*

M. Routet and Cayetano C. Diez, being duly sworn, makes oath as follows: That they are the sureties who executed the foregoing bond; that they are each residents and householders within the State of California, and are each worth the sum specified in the said bond (in which sum they thereby bound themselves) over and above all their just debts and liabilities, exclusive of property exempt from execution.

M. ROUTET.
CAYETANO C. DIEZ.

Subscribed and sworn to on this 12th day of July, 1883,
20 by each of the sureties who executed the foregoing bond, and whose names are subscribed to and mentioned in the above affidavit, before me.

[L. S.] GEO. T. KNOX,
Notary Public.

The above bond for costs is hereby approved.

FIELD,
Associate Justice of U. S. Sup. Ct.

21 *Assignments of Error.*

1st. The court erred in holding that the grantor of the plaintiff is not shown to have been a purchaser in good faith from the State of California, under her laws, within the meaning of the act of Congress of July 23rd, 1866, and that the plaintiff, as his successor in interest, was and is not entitled to the same status in that behalf as his grantor.

2nd. The court erred in holding that in proving up the plaintiff's claim and title under said act of Congress it was incumbent on the claimant not only to produce his certificate of purchase from the state, but also to show the entire series of acts, steps, and proceedings under the law of the state which preceded the issuance of such certificate.

3rd. The court erred in holding that from and after the passage of the act of Congress of July 23d, 1866, the certificate of purchase, claim, and title of the plaintiff was void; and that he did not acquire any equitable or other rights as a state purchaser under and by virtue of said act of Congress.

22 4th. The court erred in holding that the grantor of the plaintiff did not, by virtue of his purchase in 1864 and his possession taken and continued thereunder until 1870, (the time when he was ousted by the defendant) become entitled, by virtue of said act of Congress, to the exclusive right of possession as against said defendant, until such time as he should have opportunity to present and prove up his claim under said act.

5th. The court erred in assuming and holding that the defendant had the right, under the pre-emption laws of the United States, to initiate a pre-emption settlement and claim in September, 1870, by going upon the land in question while it was in the actual possession of the grantor of plaintiff and ousting him therefrom.

6th. The court erred in holding that the presentation of the claim in 1866 to the register and officers of the United States Land Office, and the entry and noting of the claim by him in writing upon the tract books of the local and general land offices, was not a substantial compliance with sec. 2d of said act of Congress of July 23rd, 1866.

23 7th. The court erred in not holding and deciding that the claim and title of the plaintiff belonged to the class provided for and mentioned in sec. three (3) of said act of Congress.

8th. The court erred in assuming that there is no allegation in the complaint that the land for which, or in lieu of which, it is alleged the land in question was selected, had been lost to the state.

9th. The court erred in holding that the complaint does not state facts sufficient to have entitled the plaintiff to have had the land certified over to the state for his benefit under the act of Congress of July 23d, 1866.

10th. The court erred in ignoring and not deciding the real ques-

tion presented by the complaint, viz., whether the officers of the land department, upon the facts stated, were legally justified in rejecting this claim upon the ground stated, or upon any ground, and awarding the land to the defendant.

11th. The court erred in not reversing the judgment of the lower court and remanding said cause to the Superior Court of the County of Alameda, with direction to overrule the demurrer to the complaint.

24 Wherefore the plaintiff in error prays that the judgment of the Supreme Court of the State of California be reversed, and that said court be directed to reverse the judgment of the lower court and order the demurrer to the complaint to be overruled.

EDW'D J. PRINGLE,
Att'y for Plff. in Error.

SIDNEY L. JOHNSON,
Of Counsel.

25 In the Supreme Court of the State of California.

JOSÉ AURRECOECHEA
vs.
AMOS. S. BANGS.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } *ss.*

I, John W. McCarthy, clerk of the Supreme Court of the State of California, do hereby certify that the foregoing documents and papers, entitled respectively "Complaint," "Demurrer," "Order sustaining Demurrer," "Notice of sustaining Demurrer," "Judgment," "Notice of Appeal," "Stipulation," "Opinion of Court," "Judgment of Sapreme Court," and "Bond on Writ of Error," are each full, true, and correct copies of the originals on file in my office, and that the same constitute a true copy of the record and of all proceedings in the above-entitled cause.

In witness whereof I have hereunto set my hand and caused the seal of the Supreme Court of California to be affixed on this the 8th day of August, A. D. 1883.

[SEAL.]

J. W. McCARTHY, *Clerk.*
By FRANK MYERS, *Deputy.*

(Endorsed on cover:) California Supreme Court. No. 1100. José Aurrecoechea, plaintiff in error, vs. Amos S. Bangs. Filed 11th October, 1883.

4-381 & 387

No. .....

In the Supreme Court

OF THE

UNITED STATES, WASHINGTON, D. C.

JOSE AURRECOECHEA,

Plaintiff in error,

vs.

JOSEPH D. BANGS, as the Administrator of the Estate of Amos E. Bangs, deceased,

Defendant in error.

Brief of Plaintiff in Error.

EDWARD J. PRINGLE,
Attorney for Plaintiff in error.

Filed, ... *1884.*

....., *Clerk,*

By ....., *Deputy Clerk.*

Independent Print, 459 Ninth St., Oakland.

In the Supreme Court

OF THE

UNITED STATES,

WASHINGTON, DISTRICT OF COLUMBIA.

JOSE AURRECOECHEA,
Plaintiff in error,

vs.

JOSEPH D. BANGS, as the Administrator of the Estate of Amos E. Bangs, Deceased,
Defendant in error.

Brief of Plaintiff in Error.

This is an action brought on the equity side of the State Court, seeking to charge the defendant in error with the holding of the legal title to the N. E. ¼ of Sec. 13, Tp 3 S., R. 2, E. Mt. Diablo Md., containing 160 acres of land, situate in Livermore Valley, Alameda County, California, as the trustee of the plaintiff in error, and to compel and enforce a conveyance of such title from the defendant to the plaintiff.

The plaintiff claims that his grantor had the exclusive right, as against the defendant, to have

received and acquired the title to said land from the United States, under and by virtue of an Act of Congress, entitled "An Act to quiet land titles in California," approved July 23d, 1866 (14 Stat. at Large, 218), and that such right has been, in violation of said act of Congress, denied him.

The facts out of which the controversy arises are fully stated in the complaint (Record, pp. 3 to 8), an abstract of which is as follows:

1st. That in the year 1863 the State of California made a selection of the land in question, under her laws, as indemnity land, in virtue of the provision of the 7th Sec. of the Act of March 3, 1853.

2d. That at the time of such selection, the land had not been surveyed by authority of the United States, but that the land had only been marked off and designated in the field by the U. S. Surveyor-General.

3d. That in February, 1864, the State sold and disposed of the land under her laws to the plaintiff's grantor, who paid the State for the land, received a certificate of purchase therefor, and became and was a purchaser in good faith from the State.

4th. That in 1865 the purchaser went into the actual possession of the land under such purchase

and so remained in such actual possession until he was dispossessed by the defendant in September, 1870.

5th. That on the 24th day of September, 1870, the defendant, with full knowledge of the claim of said purchaser, and while the latter was in the actual occupation of the land, did enter into and upon said land and oust said purchaser therefrom, claiming the right to do so under the general pre-emption laws of the United States.

6th. That on or about the 1st day of July, 1871, the Township Plat, embracing said land, was for the first time filed in the land office as a permanent record therein.

7th. That within three months thereafter, the claim of said purchaser was by him presented to the proper Land Department of the United States, and the claim and purchase was then and there fully proved up, to the satisfaction of the Commissioner of the General Land Office.

8th. That at the same time the defendant appeared and contested said claim, and claimed the right to be permitted to enter said land, by reason of his settlement thereon under the pre-emption laws of the United States.

9th. That the only subject of contest, and the only objection made upon such contest to the claim of said purchaser, the plaintiff's grantor, was that up to June 6, 1871, the land had been a portion of a large tract, embraced by the exterior

boundaries of the Mexican grant Las Pocitas; although on said latter date said tract had been forever excluded from any claim under said grant.

10th. That upon such issue and question of law alone (the word "above" in line 8, p. 7 of the record should read "alone," as it is so in the original complaint) the Commissioner of the General Land Office and the Secretary of the Interior both held and decided that such claims were excluded from the remedial and confirmatory provisions, and all the provisions of the Act of Congress of July 23, 1866, and for that reason and no other rejected the claim and awarded the land to the defendant.

11th. That in pursuance of such decision the defendant was permitted to and did enter said land, and on or about September 6, 1876, in pursuance of said entry and decision, the said Commissioner caused a patent to be issued and delivered to the defendant, whereby the legal title to said land was given to the defendant.

The complaint is met by the defendant with a *general demurrer* only, viz.: "*That the complaint does not state facts sufficient to constitute a cause of action.*" (Record, p. 8).

The demurrer was sustained in the inferior Court and judgment absolute passed in favor of the defendant. From that judgment appeal was taken to the Supreme Court of the State of California, and by that Court the judgment was

affirmed. It is from the judgment of the said Supreme Court that the case has been brought up to this Court for review.

The opinion of the Supreme Court of this State, found in this Record, pp. 11 to 17, is entitled in the case of Aurrecorchea *vs.* Sinclair. The case at bar and the Sinclair case are in every respect identical with the exception of the names of the defendants and the description of the land in question. The two cases were argued and submitted together, and but one opinion was written, the case at bar having been decided at the same time and upon the same points and reasoning as that case. (See p. 18 of Record).

The averments of the complaint, standing as they do upon general demurrer, have the same force and effect as *an agreed statement of facts.*

The complaint it will be seen first sets forth the facts of the case and then proceeds to show that all these facts were shown and proved to the satisfaction of the land officers of the United States in the contest before them, and further alleges that they found all these facts to be true as stated, and that they thereupon disallowed and rejected the claim of the plaintiff's grantor for the sole reason and no other, viz.: that it appeared that the land in question had up to a certain date, viz.: June 6, 1871 (a date long prior to said contest), been a part of a large area of land embraced by the outer boundaries of the Mexican grant Las

Pocitas, although at the time when the claim was presented and at the time of the contest the land in question had been forever excluded from any claim under said grant and was public land of the United States and subject to be disposed of like other public land.

The facts shown in this case are nearly identical, and the questions of law involved are the same as the questions in issue and determined by this Court in the case of Huff vs. Doyle et al., 93 U. S., 558. (No. 661 decided January 15, 1877).

In the above case the claim had been approved in November, 1871, by the officers of the Land Department, the land certified over to the State and patented, and this title was attacked.

In July, 1875, our Supreme Court in the same case, viz.: Huff vs Doyle et al., 50 Cal., 16, had decided that lands so situated and such claims were not affected by the Act of July 23, 1866, and the officers of the Land Department were not thereby authorized to approve such claims or certify over such lands. Soon after this decision by the State Court the land officers changed their rulings on that question and rejected such claims until the decision of this Court in January, 1877, in Huff vs. Doyle, supra., reversing the State Court.

The case at bar is one of the cases that came before the land officers for decision after the decision of the State Court in 1875 and before the

decision of this Court on the same question in 1877. The patent issued to defendant September 6, 1876. (See Record p. 7).

Had the decision of this Court been made prior to the contest mentioned in the complaint the claim of the plaintiff's grantor would have been approved and he would have received the title to the land.

We submit that a substantial right under the Act of Congress has been denied. The Land Department is without power to correct its mistake because the title has passed to the defendant. Will the Courts afford any relief in such a case? Our Supreme Court we submit has refused to meet the case on its merits or on any substantial ground, and has read the case out of Court as upon special demurrers to the complaint, and upon false assumptions and premises have denied any relief.

The rules of pleading in this State, both at law and equity, are laid down by our Code of Procedure. As to the complaint it provides, Section 425, "The complaint must contain * * * *A statement of the facts constituting the cause of action in ordinary and concise language,*" &c.

Ultimate facts only are to be stated.

Green vs. Palmer, 15 Cal., 414.

Sec. 430 of the Code points out seven distinct causes of demurrer. All of these, except the 1st and 6th, are regarded as special demurrers.

In relying upon a special demurrer, such as

"*that the complaint is ambiguous, unintelligible or uncertain,*" the pleader is required not only to demur in the language of the Statute, but also to point out by his demurrer wherein the complaint is ambiguous, unintelligible or uncertain (Section 431), otherwise such demurrers will be disregarded.

Where no objection is taken by special demurrer "the defendant must be deemed to have waived the same," etc. (Section 434).

We submit, however, that either upon *general or special demurrer* the complaint is sufficient and the demurrer should have been overruled.

We shall rely upon such assignments of error as will be found in the Record, pp. 21 and 22, and as herein specified or referred to, viz:

I.

The Court erred in holding that the grantor of the plaintiff is not shown to have been *a purchaser in good faith* from the State of California within the meaning of the Act of Congress of July 23, 1866, and that the plaintiff as his successor in interest was and is not entitled to the same status in that behalf as his grantor.

The substance of the 1st Section of that Act upon that proposition is, viz: *That in all cases*

where the State has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any Act of Congress and has disposed of the same under her laws to purchasers in good faith, the lands so selected shall be and are hereby confirmed, etc.

The point is that the plaintiff must show that his grantor was a *purchaser in good faith* before he can be admitted to any rights under the Act of Congress.

The *purchaser in good faith* within the meaning of the Act doubtless means no more than one whose purchase was actually and honestly made.

Now what does the complaint show on that point? It avers that in the year 1863 the State selected and located under and by virtue of her laws the land in question in lieu of and as indemnity for certain 16th or 36th Sections of land in said State, or portions thereof, which had become lost to the State under the terms and conditions of the grant by Congress to the State of the 16th and 36th Sections, or lands in lieu thereof and in part satisfaction of said grant.

(See 6th and 7th Sections Act of March 3, 1852, 10 Stat. at Large, p. 246). Record, p 3, 1st sub. complaint.

It seems to be conceded that the complaint upon the question of selection and location by the State is good. No objection is made to that.

It is next averred that on the 17th of February, 1864, the State under and in pursuance of her laws in that behalf made and provided, sold said tract of land so, as aforesaid, selected and located, and the plaintiff and his grantor became and were the purchasers of said land in good faith from the State of California, and then and there paid to said State the purchase price therefor pursuant to the law of the State, and then and there the State by its proper officer, the Register of the State Land Office, issued and delivered to the grantor of the plaintiff, pursuant to the law of the State, a certificate of purchase of said land.

That in the year 1865 the grantor of the plaintiff under and by virtue of said purchase and certificate of purchase entered into and upon said tract of land, and thereafter held and enjoyed the actual possession thereof until he was ousted therefrom by the defendant, viz: until September 24, 1870—five years. (Record, pp. 3 and 5, compt. subd. 2 and 5).

It is further averred that the plaintiff is now the owner and holder of said certificate of purchase of said land and the equitable owner of the land. (Record, p. 8). As a matter of fact the plaintiff succeeded to said ownership as the legatee or heir at law of his deceased brother, Francisco Aurrecoechea. No objection is made to the above averment on p. 8 as to its sufficiency in showing the plaintiff to be the real party in interest herein.

The Court admits that the plaintiff is shown to be the successor in interest of the original purchaser from the State, *but declares* in substance that if he became such successor after the ending of the contest in the land office in 1876 he does not stand before the law in the same character of purchaser in good faith as his grantor may have stood. This we submit is not law.

We submit that thus far the grantor of plaintiff appears from the pleadings to be a purchaser in good faith within the meaning of the Act of Congress, and the plaintiff, his successor, is the same.

The law of the State (Stat. Cal. 1858, p. 129, Section 9) defines a *Certificate of Purchase* to be a document bearing the seal of the office of the Register of the State Land Office, countersigned by the State Treasurer, properly describing the tract sold, the amount paid, to whom sold, and other particulars of sale, and stating that the party purchasing, his heirs or assigns, will be entitled to a patent, provided the land is confirmed to the State by the general government, etc.

Section 17 of the Statute of April 27, 1863 (Stat. Cal. 1863, p. 591), under which this land was sold, provides that the "*certificate of purchase shall be deemed prima facie evidence of legal title to the land for which the certificate of purchase is issued.*" * * * Also that "such certificates and all rights acquired thereby

shall be subject to sale and transfer by deed or assignment."

Our late Supreme Court held that the certificate of purchase itself was *prima facie* evidence that the holder and owner was a *purchaser in good faith* within the meaning of the Act of Congress of July 23, 1866.

Hodapp vs. Sharp, 40 Cal., 71.

Foscalina vs. Doyle, 47 Cal., 441.

The Court says (Record, p. 16) that this certificate "having been issued for land which was not public land and which had not been surveyed by the United States, it was void: and being void it was not evidence of that location on the land and that purchase of it from the State and payment for it which would constitute them *bona fide* purchasers." This construction takes from the Act of July 23, 1866, all its efficacy. It is equivalent to saying that no purchaser shall have the benefit of the Act unless he has no need of it.

There is nothing on the face of the complaint tending to show that Francisco Aurrecoechea, the grantor of the plaintiff, the original purchaser, had any knowledge in 1864 that this land was within the exterior boundaries of the Mexican grant.

A similar question was raised in Hodapp vs. Sharp, 40 Cal., 71. It was assumed to have been

shown that the 16th or 36th Sections, or portion thereof, in lieu of which the land had been selected was *in place*, i. e., had not been taken by any private claim and was not lost to the State. That hence the selection had no basis and was void, and *therefore* the plaintiff was *not a purchaser in good faith* under the Act of Congress of July 23, 1866. In that case the Court held that if the fact was as claimed *it was the error of the State officials*, and that the plaintiff by such error would not be deprived of the position of a purchaser in good faith. That it was because of blunders of that kind that made the Act of Congress necessary.

The complaint in this case shows that the selection and location of the land was made *by the State*, through its proper officer, the State locating agent.

But we submit that the question as to whether the plaintiff's grantor was a purchaser in good faith was one to be determined by the examining officers of the Land Department, and the complaint avers that these officers found all the facts the same as they are stated in the complaint, and found "*that on the 17th day of February, 1864, the grantor of the plaintiff became the purchaser in good of said land from the State*," etc.

II.

The Court held that in order to show the grantor of plaintiff to be a purchaser in good faith, it was

necessary for the plaintiff to allege that in the contest before the Land Department, they not only produced the certificate of purchase, but also proved the performance of the series of acts required by law to entitle them to the certificate, and the steps which had been taken to complete the purchase from the State. (See Record p. 16.)

This is our second assignment of error.

We submit, as a question of pleading, it was and is not incumbent upon us to set forth in the complaint every piece of evidence that we produced before the officers of the Land Department, or that we intend to produce in this case.

We do set forth the ultimate facts upon which our rights depend, and we show that we proved them up to the satisfaction of said officers, and that such facts were found to be true—perhaps we did produce the proofs suggested by the Court, and will produce them again in this case to establish the same facts if we can ever get to a trial on the merits.

Under no system of pleading are the *proofs* or probative facts required to be set forth in the complaint.

The Act of July 23d, 1866, leaves the question of sufficiency of proofs entirely in the discretion of the examining officers, and they must have found the proofs sufficient, as they decided the facts in our favor.

The cases cited by the Court in support of their proposition have no bearing on the question.

III.

We shall beg leave to present our views under the 3rd and 4th assignments of error as though they were one assignment, for the reason that they involve substantially the same proposition.

The Court assumes that after the passage of the Act of Congress of July 23d, 1866, the certificate of purchase claim and title of the plaintiff's grantor was still void, and that no right was conferred upon him by said Act, that he did not by virtue of his purchase in 1864, and occupation of the land under such purchase, become entitled by said Act of Congress to the exclusive right of possession as against the defendant until such time as he should have opportunity to present and prove up his claim

This is the substance of what will appear from a careful examination of the opinion of the Court, and we submit that it is the prime error of the Court, and the vice of the entire opinion. We submit that such doctrine is in conflict with the construction given to this Act by our late Supreme Court, and also by this Court

Toland vs. Mandell, 38 Cal. 43.
Foscalina vs. Doyle, 47 Cal. 437.
Huff vs. Doyle, 93 U. S. 558.

In the last cited case this Court held that after the final survey of the Mexican grant and the exclusion of the land in question from any possible claim thereunder, *the claimant* by virtue of his purchase from the State *had the right* to present such claim under the Act, and in case his proofs were satisfactory he was entitled to have his claim approved and the land certified over to the State for his benefit.

We submit that such construction having become the settled and true construction of the Act in such cases, it necessarily follows that in cases of this character, the State claimant, under the 3d section of the Act, *upon its passage*, became invested with all the rights of a pre-emption settler upon unsurveyed land, viz: in this class of cases to hold the possession of the land as against all persons, except the Government and the Mexican grantee, until such time as he should have opportunity to present and prove up his claim under the Act of Congress.

All pre-emption settlers on unsurveyed land hold possession, and their rights are subject to certain contingencies, i. e., Congress may, at its pleasure, devote the land to the uses of the Government, or may grant it to other persons, in such case the rights of the settler cease.

So in this case if the land in question had been included in the two league survey of the Mexican grant the right of plaintiff's grantor would have

become extinguished; the opportunity to present and prove up his claim would have never occurred, but as about ten square leagues of land, including this claim, was, on the 6th day of June, 1871, forever excluded from any further claim under the Mexican grant, the opportunity came.

According to the doctrine of the Land Department and our Supreme Court, in this case, the grantor of the plaintiff would have been in a better condition, under the law, had he simply settled on the land as a pre-emptor on unsurveyed land, and never have paid a dollar to the State or elsewhere—in such case it seems there would have been no question of his right.

We submit that upon any just construction of the Act of Congress the State claimant, who has paid for the land and been clothed with the apparent right and title thereto, and has settled and resided on the land for five years, should be in no worse position than one who, nine months before the final confirmation of the Mexican grant survey comes upon the land and dispossesses him.

The complaint shows that the Mexican grant was segregated from the larger tract by survey in the field in 1869—the defendant entered on the land September 24th, 1870—the survey was confirmed and became final June 6th, 1871.

IV.

This naturally brings us to our 5th assignment

of error, viz: That the Court erred in assuming and holding that the defendant had the right under the pre-emption laws of the United States to initiate his pre-emption settlement and claim in September, 1870, by going upon the land in question while it was in the actual possession of the grantor of plaintiff and ousting him therefrom.

It will be observed that this intrusion upon the land in question by the defendant was in September, 1870, and after the land called for by the Mexican grant had been practically segregated.

It was then reasonably certain that the plaintiff's grantor would soon have the opportunity to present his claim under the Act of 1866.

At the time when the contest was pending in the Land Department, in or about the early part of 1876, the doctrine of the cases of Atherton vs. Fowler, 96 U. S. 519; Hosmer vs. Wallace, 97 U. S. 597; Trenouth vs. San Francisco, 100 U. S. 25; followed by our Court in Davis vs. Scott, 56 Cal. 165, had not been announced.

According to these cases the defendant was a bare intruder and trespasser, and his pre-emption settlement and claim had its inception in his own wrong, and that irrespective of the validity of the State claimant's title or right.

It may reasonably be inferred that the defendant, by this wrongful intrusion and intervention of himself between the State claimant and the Government, prevented such claimant from per-

fecting his title under the Act of Congress and procured the land to be given to himself.

It may be said that the Department officers would have decided the same way had there been no intervention; but let us remember that on the 15th of January, 1877, less than four months after that contest ended, this Court decided the case of Huff vs. Doyle, which would have given plaintiff's grantor the land, or a rehearing in the Land Department resulting in his favor.

The defendant having procured the issuance of the patent to him in September, 1876, all relief in the Land Department was gone.

V.

The Court erred in not holding and deciding that the claim and title of the plaintiff belonged to the class provided for and mentioned in Section 3d of the Act of Congress of July 23d, 1866.

At page 14 of the record the Court says: *"To this last class of lands the land in dispute belongs; it was not surveyed by the United States until 1871, and the official plat of the survey was not filed in the proper land office until the 28th of June, 1871.*

No objection whatever can be found with that statement; it is the ultimate fact which results from what is said in the complaint on the subject of survey. It also shows that the land in ques-

tion did belong to the class provided for in Section 3d of the Act of Congress.

It should have obviated the not very intelligent criticism of the allegations of the complaint found on p. 15 Record.

The allegations of the complaint on the subject merely give a history of what had been done on that behalf as shown by the records of the Surveyor-Generals and the local land offices.

From the allegations we submit that the Township was surveyed in the field in 1862, and the survey was constructed into a plat, but that such Township plat was not filed as a permanent record in the local land office until about the 28th of June or the 1st of July, 1871.

No Township survey is deemed complete until the plat is filed in the local land office as a permanent record. The land embraced therein then becomes surveyed land—in any view of the matter there was no time after the passage of the Act of 1866 that any action could have been taken on the part of the State claimant, until after the filing of the Township plat in June or July, 1871. It ought to have been perfectly apparent to the Court why no action had been taken on the claim. 1st. The land was supposed to be within the exterior boundaries of the Mexican grant, and for that reason the Township plats were withdrawn and withheld from filing; and 2d. No plat of survey was on file after the passage of the Act of

1866, until June or July, 1871, and no action can be had where the Township plats are not on file in the local land office.

We submit that the Court has sought to incorporate into the complaint certain presumptions and inferences unfavorable to plaintiff which are not justified in fact, and which are not proper on demurrer, as every intendment should be in support of the pleading.

VI.

The Court say (p. 17) that there is no allegation in the complaint that the land, viz: the portion of the 16th or 36th Section, for which the land in dispute was selected, *had been lost to the State.*

In this the Court erred: It is alleged in the complaint (see last part of Sub. one p. 3) that the portion of the 16th or 36th Section in lieu of which the land in question was selected *had become lost to the State under the terms and conditions of the Act of March 3d, 1853.*

But we have already shown that the Court in the case of Hodapp vs. Sharp, supra, held that to be an immaterial question as to claims under the Act of 1866. That if such be the fact it was the mistake and blunder of the State officials, for which the claimant is not responsible.

In the latter part of the opinion commencing with the word "Furthermore," p. 17, we find a

key to an error of the Court in its understanding and construction of the decision of this Court in Huff vs. Doyle et al, supra

The Court evidently construes that opinion to hold that after the land has been excluded from the claims of the Mexican grant, in order to avail the State purchaser, under the Act of 1866, *an entirely new selection and location must be made*—else their language has no meaning.

The 6th Section of the Act of 1866 is a legislative construction of the 7th Section of the Act of March 3d, 1853, as to the point of time when the State is entitled to select indemnity for 16th and 36th Sections lost to the State.

It has never before been supposed to have any bearing whatever upon selections made prior to July 23d, 1866; it was not intended to be retroactive, but only to furnish a rule for future cases.

Again the *furnishing of the lists* by the Surveyor-General, is not intended to be and has never been regarded as a *condition precedent* to the right of the State to select indemnity for the 16th or 36th Sections, lost to her, as the Court seems to think. As a matter of fact, the Surveyor-General has never furnished a single list to the State on the subject as required by the Act.

The State officers have been at all times compelled to hunt up and ascertain for themselves the 16th and 36th Sections, which have become lost to the State, and make them the basis of selection of

indemnity land, subject to the approval of the land officers of the United States. The Surveyor-General of the United States declines to furnish these lists for the reason that neither the State nor Congress has provided him any compensation for so doing.

The State has been, since the Act of 1866, constantly making selections of indemnity land, and will continue so to do until the immense area of land within her borders has been surveyed and disposed of.

We submit that the facts constituting a cause of action are stated in the complaint in ordinary and concise language, and are not subject to the objections made in the Court below, and are not subject to any objection which can be reached by demurrer, and if admitted to be true, they show that under the decision of this Court in Hull vs. Doyle, 93 U. S. 558, the grantor of the plaintiff, under the law, had the absolute right as against the defendant to have had his claim approved and the land certified over to the State for his benefit.

In conclusion we would call the attention of the Court to the fact that the Act of July 23d, 1866, has reference only to lands in California.

2d. That it was passed for the *sole benefit* of *the persons*, or their grantees, who had purchased lands from the State, under the laws of the State, prior to the passage of the Act.

3d. Section three declares that from and after the passage of the Act, such claims, when marked off and designated in the field *shall have the same force and effect* as the *pre-emption rights* of a settler upon unsurveyed public land, * * and upon the filing of the Township plat * * * the *holder of the State claim* shall be allowed the same time to present and prove up his purchase and claim as is allowed pre-emptors under the existing laws.

4th. Without this Act these claims were nearly all invalid, because the selections were made upon land not surveyed by authority of the United States. Instead of issuing a patent direct to such purchaser, the Act required the land upon the approval of the purchaser's claim to be certified over to the State. This was the mode adopted for transmission of title to the real beneficiary of the Government; and in cases where the State had received the full purchase price for the land, as in this case, she would hold the naked legal title in trust for her purchaser.

The point to which we desire to call the attention of the Court is this, that it was the *individual State purchaser*, or those claiming under him, who were the real beneficiaries of the United States, and they received their titles by virtue of the Act of Congress alone. So that both the State claimant and the defendant were seeking to acquire title to this land under the law of the

United States. They each claimed to be *pre-emptors*. One by virtue of his settlement on unsurveyed land under the Act of Congress March 30, 1862 (12 U. S. Stat. at Large, p. 409, Section 7); the other by virtue of the 3d Section of the Act of Congress July 23, 1866 (14 U. S. Stat. at Large, p. 218).

We submit that the complaint shows that the latter had a clear and perfect right under the law to have had the title to this land passed to the State, his trustee, for his benefit, in accordance with the Statute of the United States. We submit further that the former never did acquire any right under the pre-emption or any other law of the United States, but that his attempted pre-emption settlement was in violation of law, and that the right accorded to him was upon the basis of his own wrong, and that he now holds the title to the land by virtue of his wrongful acts and in violation of the rights of the plaintiff as the successor of the rightful claimant.

Where the officers of the Land Department have by a *mistake of law* given the title to one party which should under the laws have been given to another, a Court of equity will control such title and compel a transfer of it to the one who has the better right.

Johnson vs. Towsley, 13 Wall., 73.
Lindsey vs. Hawes, 2 Black, 558.
Garland vs. Wynn, 20 How., 6.
Silver vs. Ladd, 7 Wall., 228.

We therefore submit that the judgment of the Supreme Court of the State of California should be reversed, and that said Court should be directed to reverse the judgment of the Superior Court of the County of Alameda, and order the demurrer to the complaint to be overruled.

Respectfully submitted.

Edward J. Pringle

Attorney for Plaintiff in error.

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Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSÉ AURRECOECHEA, PLAINTIFF IN ERROR,

vs.

AMOS S. BANGS, DEFENDANT IN ERROR.

In Equity.

A. CHESTER,
Of Counsel for Defendant in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSÉ AURRECOECHEA, PLAINTIFF IN ERROR,

vs.

AMOS S. BANGS, DEFENDANT IN ERROR.

In Equity.

BRIEF OF A. CHESTER, *Of Counsel for Defendant in Error.*

This was a complaint made by the plaintiff in error in the third district court, county of Alameda, State of California, that the defendant had obtained possession of, and a patent for, a tract of land belonging to the plaintiff, and asked the court in equity to decree the legal title to the plaintiff. This land was included within the exterior boundaries of the Mexican grant Las Pocitas until June 6, 1871. It is claimed to have been bought of the State on the 17th of February, 1864, almost twenty years ago.

The defendant was a pre-emptor, in possession of, and improving this land at the time of the confirmation of the final survey of the said Mexican grant, and it was awarded to him by the Commissioner of the General Land Office after a full adjudication, in which both parties appeared in contest in 1871, and a patent was issued to the pre-emptor after full proof and payment in 1876.

The complainant in the court below claimed that he was the rightful owner of this land under a certificate of pur-

chase from the State of California in 1864, and that the Commissioner of the Land Office ought to have awarded it to the State in 1871, and asked the court in equity to decree the patent to him, and that the defendant be constituted a trustee for that purpose. The defendant demurred to this complaint, that the plaintiff on his own showing made out no case. The court sustained the demurrer.

An appeal was taken to the supreme court of the State, which affirmed the judgment of the court below.

The case is now brought on a writ of error into the United States Supreme Court from the judgment of the State supreme court.

GENERAL STATEMENT.

The State of California, claiming a selection of lands as part indemnity, in lieu of the sixteenth and thirty-sixth sections of lands said to be lost to the State, (of which there is no proof,) gave a certificate of purchase to some one whose name does not appear, on receipt of one-fifth the purchase price. The appellant admits, in the court below, that no rights were gained by this transaction, because the land was included in the Mexican grant. But he claims that the act of July 23, 1866, gave life to this void claim of 1864, notwithstanding this same act excluded State selections in express terms from all Mexican grants. There is no showing of possession, improvement, or occupancy of this land under that certificate of purchase from the State, from its issuance to this time, nearly twenty years. The Mexican grant possessed it until 1871, and the defendant ever since. About three months after this land was excluded by survey from the Mexican grant "Las Pocitas," it appears that the original holder of this State certificate presented his claim to the local land office, without any renewed selection by the State, and asked that under the authority of that certificate it be certified to the State. This question was fully adjudicated by the Land Department, upon which Congress had conferred entire jurisdiction of such issues, and the land was awarded

to this defendant, after being there contested by both parties.

From that time for the seven succeeding years until 1878, the title of this defendant, as a pre-emptor, remained unquestioned, as it appears. The defendant found this land unoccupied, and located upon and improved it under the rules of the General Land Office, which had jurisdiction of it both by the General Land Office laws and by the special act of 1866.

At that date, this thrice avoided nineteen year old State certificate is claimed to be in the possession of this appellant—an entirely new claimant. When or how he possessed himself of it does not appear, nor does it appear that the State certificate had not been cancelled, nor yet that he had paid any valuable consideration for it, and it may well be presumed by his avoidance of these questions, that none of them would add to his credit, for they would have been important elements in establishing a veritable claim. But it does appear that if he holds it, he came into possession of it with the full knowledge of the action of the Land Department, and, of course, with full notice of the title and possession of this defendant, with the full knowledge also that the State was itself asserting no claim to have this tract certified to her, and had never received any further payment therefor, or interest as for money due. The time for the final payment of this certificate, if it had been a valid sale, expired nearly fourteen years ago.

It may be proper to say in this place that there is no evidence nor even pretense that the State of California ever made any selection of this land, as required by the act. The only showing is, that without filing any selection of the land, they gave this man a certificate of the tract he wanted, allowing him to try and see what he could do with it; and as far as appears, the State never laid any claim to it. It was well known that the act of March 3, 1853, excluded this land from any State selection, and no legal selection,

therefore, as it appears, was ever made. But even if the selection had been made in good faith in due form, the State claimant shows himself that it was void under the act of 1853, and says so in his complaint.

Then, again, the State makes no pretense to any claim under the act of 1866, either by filing any selection or asking that it be certified to the State, for the State agents well knew that this land was again specially excluded by that act—as it is admitted that the land was still part of Mexican Grant Las Pocitas, and so remained until June 6, 1871.

The appellant claims that he was in possession, but shows no documental or other evidence of it; and he shows that he neither did or could have had any before 1871, for he admits that it was in the possession until that date of the Mexican grantees.

The pretense is that this land was in lieu of the sixteenth and thirty-sixth sections which had been lost to the State, of which there does not *appear* to have been any loss, for which this should be any indemnity.

In the language of the judgment of the State supreme court, "It was necessary for the complaint to show by proper averments that the plaintiff, in the assertion of his claim to the land, proved that he had purchased it in good faith from the State; that it had been selected and located under the laws of the State as part of the surveyed or unsurveyed lands of the United States which were subject to be so selected, and that he had complied with the terms and conditions of the act of Congress which ratified the selection, (9 Wallace, 298,) these constituted the elements of his asserted equitable right. But upon all of them the complaint is uncertain and insufficient. It is not alleged, nor does the plaintiff claim, that he purchased the land directly from the State, or that he ever located upon it, or occupied or improved it, or paid, or contracted to pay, the State for it. On the contrary, it is alleged that the land

was purchased from the State by his grantor or grantors, to whom, after payment pursuant to the laws of the State, which required a payment of 20 per cent. of the purchase, a certificate was issued under which they occupied the land until 1870, when they were dispossessed by the defendant, who has ever since continued in the unquestioned and undisturbed possession of the land. And, except so far as it may appear from the averments of the legal conclusions that they were *bona fide* purchasers under the laws of the State, and that a certificate was issued to him, it does not appear from allegations in the complaint that they had complied with the laws of the State so as to constitute them *bona fide* purchasers from the State. It might be that the authorities of the State had refused to notify the Register of the Land Office of the selection of the land, as they were bound to do by the 2d section of the act of Congress. Just because the alleged purchasers had not complied with the State laws, *non constans*, that the State would have conveyed to them the land if it had been selected. Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute. It is true that, under the laws of the State, the certificate of purchase was made evidence of the legal title; but having been issued for land which was not public land, and had not been surveyed by the United States, the certificate was void. (Young *vs.* Shinn, 48 Cal., 26.) Being void, it was not in itself evidence of that location on the land, and that purchasers of it from the State and payment for it, which would constitute them *bona fide* purchasers.

"To constitute them such, as against the patentee of the United States—to whose title they assert a better right—it would be necessary for them to allege in their pleading that in the contest for the land before the Land Department they not only produced their certificate of purchase, but they also proved that there was 'found' the performance

of the series of acts required by law to entitle them to the certificate, and the steps which had been taken to complete the purchase from the State, so as to entitle them to a patent for the State. (Laughlin *vs.* McGarvey, 50 Cal., 169; Cadiorque *vs.* Duran, 49 *id.*, 356; The Secretary *vs.* McGarrahan, 9 Wallace, 298.) Unless these things were proved and 'found,' they would fail to show in themselves that better right in favor of which a court of equity would interpose to control the right of the patentee; and one who claims simply and by no other right than as assignee of their void certificate of purchase, is in no better position. Moreover, it does not appear by any allegation in the complaint when the assignment of the certificate of purchase was made—whether before or after the contest before the Land Department; nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate, or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the State.

"But whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department—as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it to the United States or the State of California—it would be neither according to equity or good conscience to compel the defendant to convey to him the legal title."

The complainant in the court below relied much upon the decision in this Court of the case of Huff *vs.* Doyle, 93 U. S., 558. We claim for ourselves all the principles there enunciated.

We would refer especially to the act of March 3, 1853, and of July 23, 1866—of the latter—

Section 1st provides: "That in all cases where the State of California has heretofore made selections of any portion of the *public domain*, in part satisfaction of any grant made

to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said States; *Provided*, that no selection made by said State, contrary to existing laws, shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any land held or claimed under any valid Mexican or Spanish grant."

And provided further, "That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law."

By section 2 it is required: "That it shall be the duty of the proper State authorities, when it has not already been done, to notify the Register of the United States Land Office of such selection, which notice shall be regarded as the date of the State's selection;" and then "after *investigation and decision* by the proper officers of the United States Land Department, the land might be certified over to the State by the Commissioner of the General Land Office."

Section 8 provides: "That nothing in this act shall be construed so as *in any manner* to interfere with the right of *bona-fide* pre-emption claimants."

It was well said in argument in the court below: "The rights of the parties to the premises in controversy have been adjudicated by the tribunal established by Congress *for that purpose*, and plaintiff is estopped from again litigating. By the act of Congress of July 23d, 1866, the officers of the Land Department of the General Government were vested with the power to *finally dispose* of the issues sought to be raised by this plaintiff."

In the case of Wilkenson *vs.* Merrill, 52 Cal., 424, the Court said: "The Land Department, to whom the decision of all the questions of *law and fact* pertaining to the proceedings were specially confided, having decided, the decision is conclusive against the plaintiff, who claims to acquire title from the State."

The attorney below adds: "The demurrer of the defendant was properly sustained. No cause of action is show by the complaint to exist in favor of the plaintiff."

A. CHESTER,
Of Counsel for Defendant in Error.

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PART SECOND.

Supreme Court of the United States.

OCTOBER TERM, 1884.

JOSÉ AURRECOECHEA, PLAINTIFF IN ERROR,

vs.

JOSEPH L. BANGS, ADMINISTRATOR OF AMOS S. BANGS, DEFENDANT IN ERROR.

In Equity.

BY STIPULPTION ON FILE, SEVERAL OTHER CASES NOW PENDING IN THIS COURT ARE TO BE ARGUED WITH THIS AS ONE CASE.

A. CHESTER,
Of Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS.

PART SECOND.

Supreme Court of the United States.

OCTOBER TERM, 1884.

JOSÉ AURRECOECHEA, PLAINTIFF IN ERROR,

vs.

JOSEPH L. BANGS, ADMINISTRATOR OF AMOS S. BANGS, DEFENDANT IN ERROR.

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BY STIPULPTION ON FILE, SEVERAL OTHER CASES NOW PENDING IN THIS COURT ARE TO BE ARGUED WITH THIS AS ONE CASE.

Evidence as Shown by Records and Files of the General Land Office.

The record of the evidence in the contest of this case before the Land Office shows these facts:

First. A certificate was granted by the State in 1861 to J. Mora Moss, and similar certificates to others, covering these tracts of land, for which they paid 20 per cent. of the purchase price and one year's interest on the balance. It was evidently selections of their own, as no selections were filed by the State, and no showing of any lands lost to the State for which the selected tract should be any indemnity. From that

time the selections were apparently abandoned. Nothing more was done, nor any further payment made for about five years, until 1869, as the U. S. Land Office records show, when an additional interest was paid. The claimant acknowledged in the court below that this selection was then void by the restrictive terms of the act of Congress, as it was within the boundaries of the Mexican grant "Las Pocitas," and inhibited from State selections by that act.

The evidence shows nothing more ever paid on this State selection, either principal or interest.

Second. In July, 1871, the holders of this State certificate appeared before the local land officers as contestants for the lands in question, which the proofs show to have been occupied and improved by pre-emptors for about five years, or since 1866–7, and who had filed their pre-emptions with the register and receiver of the land office in June, after the final survey of the "Las Pocitas" grant, which was on the 6th of June, 1871. On the above date, July, 1871, the holders of this certificate ask to contest their claim with the pre-emptors, which was allowed, and in November of that same year 1871, an old State list which had been abandoned since its date, 1863—eight years—was produced and filed during the pendency of this contest. This was not filed by the register of State or of its locating agent.

The evidence furnished the land office in the contest discloses no possession at any time of these lands by the State claimant, whoever he may be, no occupation, no improvement of it, or that he ever set a foot upon it, or even ever saw it; nor does it appear that he and the pre-emptors ever had any contention or collision by which he was ousted from the premises, nor yet that they ever saw each other.

WHAT WERE THE "FINDINGS" OF THE UNITED STATES LAND OFFICERS TO WHOM CONGRESS, BY THE ACT OF JULY 23D, 1866, SPECIALLY COMMITTED THE ADJUDICATION OF THESE QUESTIONS?

The findings of the land officers were, as shown by its records, that under that State certificate the claimant had not the least claim to the land in any shape whatever. They did not find that he had a valid certificate, or had conformed to the State laws, or to the acts of Congress, in any respect.

But the findings, both in the local and in the General Land Office, as confirmed on appeal to the Secretary of the Interior, show these facts: That the pre-emptors were each in full occupancy and improvement of their lands at the date of the confirmation of the survey which segregated the Mexican grant "Las Pocitas" from its exterior boundaries, and that they were fully qualified pre-emptors, and that they furnished proofs that they had been in occupancy and improvement of these lands, in good faith, for several years, alleging settlement near the date of the act of Congress of 1866, and that Amos S. Bangs, the defendant in error, proved that he was settled on this tract of land in 1867, and had resided there ever since.

These pre-emptors had not pretended to any title to this land as against the Mexican grant, or as against the Government, by their prior occupancy, but only as prior to any other claimants for pre-emptions or selections of any kind. Their occupancy of this reserved land was recognized by them as a special favor to settlers by the acts of Congress, so clearly and fully enunciated by his honor, Justice Fields, in the decision of the case of Shipley *vs.* Cowan, as follows:

"The act of Congress of March 3, 1853, provides that any settler who had settled or might thereafter settle on lands previously reserved on account of claims under French, Spanish, or other grants which had been or should there-

after be declared invalid by the Supreme Court of the United States, should be entitled to all the rights of pre-emption granted by the act of Sept. 4th, 1841, after the lands were released from reservation, in the same manner as if no reservation had existed."

No other class of men were ever allowed this privilege; no one could buy, no one select, no one could make a valid claim to reserved lands but by occupancy and improvement under the rules of the General Land Office. The pre-emptor even then could gain no title until the reservation should be terminated, and the Land Office should admit his proofs.

JUDICIAL CHARACTER OF THE LAND OFFICERS OVER THESE QUESTIONS.

The act of Congress of July 23, 1866, specially authorized the officers of the Land Department to adjudicate all claims to the public lands under that act. Both these parties appeared before the land officers with their proofs and contested their rights to this land. The rights of the parties were fully adjudicated, every opportunity was given this claimant as well as the pre-emptors, and was fully determined in the manner authorized by Congress.

I desire to refer again specially to the decision of the Shipley-Cowan case by Mr. Justice Fields—next to last section—showing the judicial character of the land officers as having final control, except where the construction of the law is brought into question. In the present case the construction of the law is brought into question, and in doing so the plaintiff has acted in opposition to the State law in almost every section applicable to this question by the act of 1863. Then the act of Congress of 1866 is assailed because the State is inhibited from putting its foot upon Mexican or Spanish grants.

It was acknowledged in the court below that the State had no claim to this land, until the act of Congress of July 23d, 1866. Well, the State has not pretended to have any claim to it since that act, or under that act, for itself or for anybody

else. The certificates which the State had given to J. Mora Moss and other parties, had been abandoned as worthless, and further payment refused; nobody had kept up the payments on the land, and at that date no one claimed it under that certificate.

Whether they were ever cancelled does not appear, but if not the certificates belong alone to J. Mora Moss, and the other original purchasers to this day, for they show on their face that they have never been sold or transferred to anybody, and no one else has any title to them, for the State law forbids it. The party that appears here as the plaintiff in error may have bought the *paper* on which the certificates were written, as he would buy other refuse paper, but he never has bought the certificates as such, for the certificates themselves contradict it, and the State statute, herein referred to, denies it. They have never been transferred from J. Mora Moss and the other original purchasers.

It no where appears that the State ever lost any lands, on which to base any selection under this certificate. But, if she had, and this selection had not been denied her by the acts of Congress, as it has been; and further, if J. Mora Moss, and the other original purchasers of certificates, had paid for the land in good faith, the certificate in the hands of this plaintiff in error is worth no more to him than if he picked it up from the street. He never bought it and he has never paid for it. He has made no attempt to show how it came into his possession, but it shows for itself as it lies in the files of the General Land Office that he did not come into possession of it legitimately, and that he is not the lawful owner. He has failed to assert or to show how he became possessed of it, or by what authority he presumes to represent it here.

The State does not appear to sanction or encourage his claim, nor does J. Mora Moss or other of the original purchasers of these certificates utter a word to justify the suit for these lands. The certificates yet belong to these purchasers unless they have been cancelled by the State.

Again, even if he had overcome or performed his whole part to the purchase of the claim, and even had it proved valid, and he had reached this point, there yet stands in his way another obstacle that the State has placed in his path, which was required of all purchasers of State lands before they could acquire any rights or advantages from the purchase. That was, the strong and potential oath required of every claimant, purchaser, or assignee before their claim could be confirmed by the State. Does he show that this has been done? On the contrary, his proofs before the Land Office show that it was not done.

In this place we desire to express our assertion of the claim of all authorities furnished by the plaintiff in error as against himself and in favor of this pre-emptor.

ASSIGNMENT OF CERTIFICATES.

There are conditions specially required by the statutes of California of purchasers of State certificates. The act of 1863 says that no transfer of such certificates or any of the rights acquired thereby can be made but by deed or assignment, executed and acknowledged before some officer authorized by law to take the acknowledgment of deeds, or before the register.

These certificates now of record in the general land office stand in the name of the original purchasers, and having never been transferred to the parties appearing in this court, they cannot represent any interest in them. It was stated in the contest before the land officers that J. Mora Moss, the purchaser of one of them, and who made the first payment, refused to pay anything more. The certificates all stand at any rate to-day in the name of the original purchasers untransferred, as shown upon the Land Office records. The State law allowing the purchase and sale of State certificates, denies the validity of them in the hands of the present claimant, whose name does not appear upon them in any form whatever.

OATH REQUIRED OF CLAIMANTS OF STATE LANDS.

Another thing is required by the same statute, viz: "The locations made under its provisions shall not be construed to give any title to, interest in, or right of possession, or occupation of any of the public lands in this State, unless the person for whose benefit the location is made, or the proceedings taken, shall first have taken the oath, which is prescribed at length in the statute." The present claimant does not pretend to having subscribed to this oath, which is a lengthy one.

NULLITY OF CERTIFICATES IF INTEREST IS UNPAID FOR THIRTY DAYS.

Another thing is required by the same statute: that when interest on a certificate fails to be paid for thirty days by the owner or assignee, after it becomes due, the State register is authorized to annul it. These certificates show upon their face that no interest, after the first payment, was made for about five years from 1864 to 1869. The interest required by the statute was 10 per cent. annually in advance. It would seem probable that the certificates had been annulled.

CANCELLATION OF CERTIFICATES IF FOUND ON GRANTS.

Another section of the same act states that, "in the event of any of the lands sold by the State proving to be *within the bounds of a* GRANT, or otherwise not the property of the State, the holder or assignee shall be entitled to receive in exchange therefor a certificate of payment for any other lands of the same class." Thus the State made provision for the cancellation of this identical claim.

ACT OF 1866 MAKES THE FILING OF CERTIFICATES THE DATE OF CLAIM.

The act of 1866 requires the State register to file a list of any lands that should be claimed by the State as lieu or in-

demnity lands with the Register of the United States Land Office, and the date of such *filing* was declared to be the date of the claim. The Register was required to investigate and determine the character of this claim. The Land Office records show no State list to have been filed until during the pendency of the contest, or about November, 1871.

It is claimed that these certificates are by statute made *prima facie* evidence in the hands of the holder. They are *prima facie* evidence also of the true holder to whom they belong The *prima facie* evidence is, that this plaintiff in error, though he hold the papers in possession on which the certificates are written, he does not hold the certificates themselves; for he himself shows that J. Mora Moss, or others of the original purchaser, still legally hold them. He has never gotten a title to the certificates, worthless as they are. The State abandoned its selections and J. Mora Moss and others their certificates twenty years ago, and neither have lisped a word since in their behalf.

It is not the worst feature of this case that it is uncertain, ambiguous, and unintelligible, and that it does not state facts sufficient to constitute a cause of action. But on its merits it discloses its worst features from the positive evidences on file and within reach of this court, placed there by this plaintiff in error himself, who has nothing to lose, for he has paid nothing for his pretended claim, nor expended a dollar in improvements. These settlers have not harmed him. When they located there they knew of no such claim, nor did this plaintiff pretend to any rights there until many years afterward. But he has for years harassed and persecuted these settlers, hoping to drive them from their homes, where they have lived and which they have paid for, and cultivated and improved for sixteen or eighteen years.

I respectfully submit the case.

A. CHESTER,

Of Counsel for Defendant in Error.

4-3814 387

No. .....

In the Supreme Court

OF THE

UNITED STATES, WASHINGTON, D. C.

JOSE AURRECOECHEA,

Plaintiff in Error,

vs.

JOSEPH L. BANGS, as the Administrator of the Estate of Amos S. Bangs, deceased,

Defendant in Error.

Brief of Plaintiff in Reply

EDWARD J. PRINGLE,
Attorney for Plaintiff in Error.

Filed, ... *1884.*

....., *Clerk,*

By ....., *Deputy Clerk.*

Independent Print, 459 Ninth St., Oakland.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1884.

JOSE AURRECOECHEA,
Plaintiff in Error,
vs.
JOSEPH L. BANGS, as Administrator of the Estate of Amos S. Bangs, Deceased,
Defendant in Error.

No. 703.

REPLY OF PLAINTIFF IN ERROR.

NO OTHER CASES ARE TO BE ARGUED WITH THIS, AS ONE CASE, BUT CERTAIN OTHER CASES ARE TO ABIDE THE DECISION OF THE COURT IN THIS CASE.

Counsel for defendant in error has furnished us with two printed documents which are intended by him, as he informs us, as his argument in this case. One is endorsed as of the October term, 1883, was made prior to our opening brief and hence could be no reply to our argument.

The one endorsed "Part Second" was made since the service of our brief. Its contents are

mainly statements of pretended facts, all of which are entirely outside the record and not before the Court, and not in any manner connected with this case, and in which statement the counsel has gone far astray from the truth, doubtless by mistake.

Our principal grievance consists in the fact that we have not been permitted, under the forms of law and the rules of evidence, to prove the facts alleged in our complaint, or in other words to have a hearing upon the merits. When any issue of fact shall be properly raised upon the record, we will then insist upon the right to present to the proper Court our proofs, and counsel may then controvert the same, if he can, in a legal mode.

The issue presented by the record, as we understand it, *is one of law exclusively.* The only facts which can be considered by Court or counsel are such as are averred in the complaint, and any facts of which the Courts take judicial notice.

The only issue tendered upon the record is that the complaint does not state facts sufficient to constitute a cause of action.

Upon this issue the facts averred are to be taken as true and incontrovertible.

Hence we submit that the statements contained in "Part Second" of brief of counsel for defendant in error are irrelievant, and entirely irresponsive to the issue, and will be disregarded by the Court.

We know nothing of counsels, investigations concerning a certificate to J. Mora Moss; all we can say is that J. Mora Moss is nothing to us nor we to him; it is obvious counsel has gotten upon a wrong track both as to his facts and mode of practice.

Counsel intimates that the complaint is defective, because we have not stated, in detail, every act and step required by the State Statute, such as making the oath required, etc.

We have shown, and upon an inspection of the State law (Stat. Cal. 1863, p. 591) it will appear, that after certain preliminary steps on the part of the claimant; the state, through her officer, the "State Locating Agent," made the selection. Considerable detail was required after that on the part of State and county officers, and the claimant. But the final act, which consummated the purchase, was the *issuance of the certificate of purchase.*

So far as the oath was concerned, the Statute provided (Sec. 29, p. 601) * * * * "no certificate of purchase or patent shall be "issued to any person for lands located under this "act until a certified copy of said description and "oath or affirmation has been filed in the office of "the State Register."

Sec. 17, as we have before shown, provides, viz:

"When a certificate of purchase has been issued by the Register, the same shall be deemed prima

facie evidence of legal title to the land for which the certificate of purchase is issued."

We therefor, submit that it must follow that such certificate is of itself presumptive evidence that the person to whom it issued has performed every act required of him by the Statute preliminary to the issuance of the certificate.

Again, these certificates of purchase prove much more; they are, under the law, presumptive evidence that the State has clothed the holder and owner with all the title the State has to the land therein described.

This is obvious, and is assumed to be so by the 3rd Section or the Act of Congress of July 23d, 1866, when it declared that "the holder of the "*State title* shall be allowed the same time to pre- "sent and prove up his purchase and claim under "this act as is allowed pre-emptors under existing "laws."

Hence, we submit that our averments as to the selection and location of the land by the State, the purchase and payment therefor by us, and the issuance of the certificate of purchase to us by the State, are sufficient and show all the equities in that behalf that could be shown.

These averments are not only good as to matter of pleading under a general demurrer, but in matters of substance they show that the plaintiff, as the owner and holder of the certificate of purchase, is not only the real party in interest, but the only

party in interest or who could maintain this action.

We submit that we have properly tendered an issue as to the ownership of the certificate of purchase; we aver that "the plaintiff is now the owner and holder of said certificate of purchase of said land from the State of California," etc. (Record p. 87,). We plead the ultimate fact. How or in what manner he became the owner is matter of proof, and not matter to be pleaded.

Another suggestion made in the opinion of the Court below and by counsel (who, by the way, adopts that opinion or portions of it quite liberally as a part of his argument) is that but twenty per cent of the purchase price was paid by our grantor.

We submit that no such inference is justified by the complaint. The Statute, Sec. 2 (Stat. Cal. 1863, p. 592), among other things, provides that "the sixteenth and thirty-sixth sections granted for the use of the public schools, or lands in lieu thereof, *shall be sold at the rate of one dollar and twenty-five cents per acre*," etc. The averment is that we "then and there paid to the State the purchase price therefor, pursuant to the laws of the State," etc

We had the option either to pay in full or to pay twenty per cent (See Sec. 14), and we submit that the only fair construction of the pleading is

that our grantor paid the purchase price, viz: $1.25 an acre. We will be ready to meet any issue upon this question should it at any time be raised.

The 2nd Section of the Act of Congress of July 23d, 1866, requires a list to be filed of all selections made on *Surveyed Land*, and provides that such filing shall be "regarded as the date of the State selection." No such requirement is made as to selections on *unsurveyed land*. Ours was a selection on unsurveyed land and belongs to the class of selections provided for by Section 3rd of the Act.

In either class of selections we submit that no superior right could be acquired by a forcible intrusion upon the actual occupation of the State purchaser or any right whatever, either before the filing of the list in the one case, or before the time when the State claimant had opportunity to present and prove up his claim in the other.

The 3rd Section declares that "such selections shall, from the date of the passage of the Act, when marked off and designated in the field, have the "*same force and effect as the pre-emption rights of a settler upon unsurveyed public land.*"

Our grantor was within the spirit and meaning of the Act of Congress of March 3rd, 1853, (10 Stat. at large 244) quoted by counsel for defendant in error.

We submit that on the 24th day of September, 1870, the date of the intrusion of the defendant

in error upon the land in question, he was seeking by his own wrong to substitute himself in the place and stead of the rightful pre-emptor under the law and by reason of a mistaken construction and application of the Act of Congress by the officers of the Land Department, and for no other reason, he was permitted so to do, and this is shown by the facts stated in the complaint.

The plaintiff's grantor in this case had precisely the same rights as the plaintiff Huff had in the case of Huff vs. Doyle et. al., 93 U. S , 558, as an inspection of the record in that case will show.

The case at bar arises upon a State selection made in the same year and within the exterior boundaries of the same grant as the Huff claim, and had our claim come before the commissioner and secretary in 1871, when Huff's claim did, or after January, 1877, the date of the decision of this Court, it would have been approved, as Huff's was.

As a matter of fact the Commissioner and Secretary, on the 17th day of February, 1876, and after the decision of our Supreme Court, assumed jurisdiction to do so, and did make an order purporting to set aside and cancel their certification to the State of the land involved in the case of Huff vs. Doyle & Bales, and permitting the defendants, Doyle & Bales, to enter and pay for the same as pre-emptors, which they did.

On the 8th day of June, 1877, by reason of the